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Supreme Court of the United States

OCTOBER TERM, 1955 — 4

DOCKET NO. ..256..

AARON AJAMIAN,

Petitioner,

against

ISIDORE SCHLANGER, HENRY SCHLANGER and SIDNEY SCHLANGER, trading as I. SCHLANGER & CO.,

Respondents,

HARRY M. AJAMIAN,

Additional defendant on counterclaim of Isidore Schlanger, Henry Schlanger and Sidney Schlanger, trading as I. Schlanger & Co.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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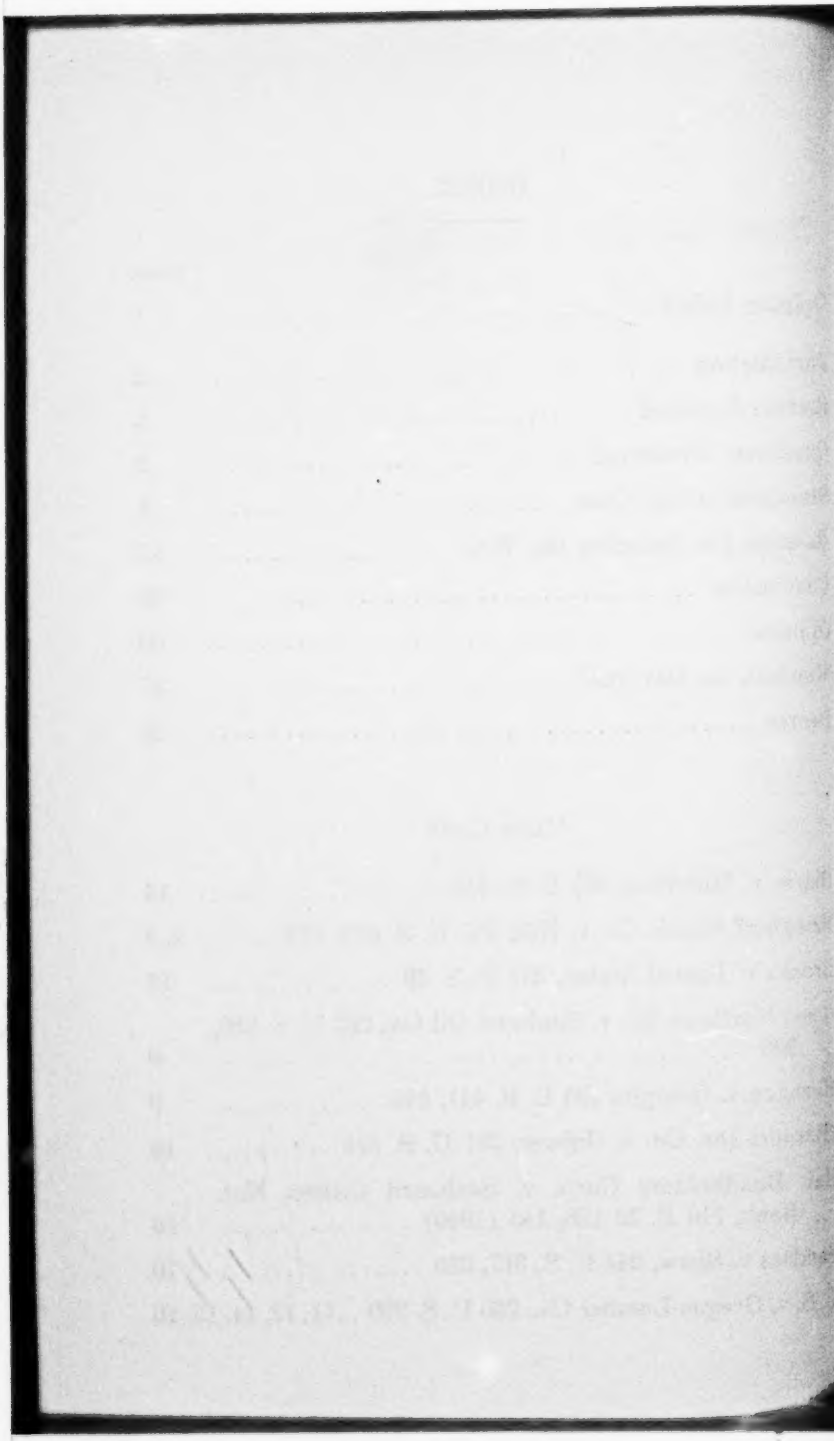

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Opinion Below

The respondents, defendants in the courts below made a motion for a Summary Judgment which the Superior Court denied, the opinion not having been reported. The Appellate Division upheld this Court by 2 to 1 vote, each Justice rendering a separate decision reported at 29 N. J. Superior 497. But the Supreme Court of New Jersey, by a divided vote, reversed the decision of the other two courts, reported at 14 N. J. Report 483, and denied the petition for rehearing without an opinion, which has not been officially reported.

Jurisdiction

The judgment of the New Jersey Supreme Court was rendered February 15, 1954, but was not entered because of the plaintiff's application for a rehearing, within the ten days provided for in said decision, solely upon the constitutional grounds, exactly the same as herein which was denied on March 8, 1954, when the judgment was entered. The time in which the petitioner may make application for a writ of certiorari was enlarged and extended to, and including August 5, 1954, by order of Honorable Associate Justice Harold H. Burton, entered June 7, 1954, within ninety days after the entry of such judgment, as required by law (28 U. S. C., Sec. 2101(c); Supreme Court Rule 22). The jurisdiction of this Court to review that judgment is based upon 28 U. S. C., Sec. 1257(3); Supreme Court Rule 19 (1) a and b.

Later under the heading "Statement of the Case" is set forth, the particulars relating to the raising of the substantial federal questions involved. *Brinkhoff-Farris Co.* v. *Hill,* 281 U. S. 673, 678, later cited together with other cases sustain the jurisdiction of this Court to grant the writ of certiorari, notwithstanding the refusal of the New Jersey Supreme Court to pass upon the Federal questions herein presented.

Statute Involved

The entire decision of the Supreme Court of New Jersey below, especially the following portion:

> "With the merger of the equitable and legal powers in the Superior Court as of September 1948, there appearing to be no equities in defendants' favor to bar him, this purchaser was at liberty after that date to amend his rescission complaint to ask the legal relief alternatively, Rule 3:8-5 now R. R. 4:8-5 or to abandon

the rescission claim and pursue the legal remedy, up to the time of or at the pretrial conference and, within limitations, even after the entry of the pretrial order, or at the trial."

The act complained of was the act of the State Supreme Court done unexpectedly.

The power of the legislature includes the Courts to regulate remedies is subject to the Constitution's provision.

Questions Presented

1. Whether petitioner was denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment when the Court below ruled against the petitioner having the issue of fraud passed upon by the Court or Jury? The issue of fraud never having been passed upon by any Court the petitioner was deprived of his day in Court.

2. Whether the decree below as applied to and construed to the laws (Rules) of New Jersey impaired the petitioner's vested right of contract obligation guaranteed by Article I Section 10, in that the power of the legislature includes the Courts to regulate remedies is subject to the Constitution's provision of the law impairing the obligation of a contract, which prohibition applies to laws impairing means of enforcement.

3. Whether petitioner was denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment when the Court below the Supreme Court of New Jersey, based its decree upon Rule 3:8-5 now R.R. 4:8-5:

(a) when said rules did not exist when the petitioner's first action for rescission was originally commenced in the Court of Chancery;

(b) when such rules were not mentioned by the appellants, in the courts below, in their motion or the brief of law for Summary judgment in the Superior Court, or in their brief in the Appellate Division.

4. Whether the decree below as applied to and construed to the laws (Rules) of New Jersey impaired the petitioner's vested right of contract obligation guaranteen by Article I Section 10 in that the power of the legislature includes the Courts to regulate remedies is subject to the Constitution's provision of the law impairing the obligation of a contract which prohibition applies to laws impairing means of enforcement, when the Court below, the Supreme Court of New Jersey, based its decree upon Rule 3:8-5 now R.R. 4:8-5:

(a) when said rules did not exist when the petitioner's first action for rescission was originally commenced in the Court of Chancery;

(b) when such rules were not mentioned by the appellants in the courts below, in their motion or the brief of law for Summary judgment in the Superior Court, or in their brief in the Appellate Division.

5. Whether the decree below is so patently erroneous as to deny the fundamental justice to petitioner. The practical effect of the judgment of the Court below is to deprive the petitioner of property without affording it at any time an opportunity to be heard in its defenses as to the issue of fraud. This is an invasion of the plaintiff's substantial right in the Constitution.

Statement of the Case

Petitioner's assignor entered into a contract to purchase the business and good will together with two embroidery machines for $96,500. The said business, good

will and two machines being sold to the petitioner's assignor by the respondents, Isidore Schlanger, Henry Schlanger and Sidney Schlanger, trading as I. Schlanger & Co.; that the sale was induced by the fraudulent misrepresentations of the respondents in that they were making a certain profit per month; that they have the best customers in the trade and would give to the petitioner's assignor the names of the customers and introduce petitioner's assignor to the customers and said customers would continue to do business with the petitioner's assignor; that the telephone number used by the respondents was part of the good will of the sale and was to be given to the petitioner's assignor by the respondents in order to continue to operate the business; that there was a certain supply of yarn which was part of the purchase price and the respondents represented that the yarn was of good quality when it was not; the respondents represented that the machines were in excellent order and in perfect running order. The good will was specifically included in the contract of the sale of the business entered into between the petitioner's assignor and the respondents. In the bill of sale it was included in the affidavit thereof. Regardless of where it was placed it was part of the contract and the bill of sale. The respondents represented that they did not intend to engage in the said business any further and that they were getting out of the embroidery business; that they had made a lot of money and for various reasons they were retiring from the embroidery business; that the petitioner's assignor would have no opposition from them and respondents would cooperate in every manner to see that the good will of the business was in favor of the petitioner's assignor.

Petitioner's assignor alleges in the said complaint that the representations were false in that the respondents failed to show the petitioner's assignor the names of the customers; failed to introduce him to the customers; failed to bring the customers to the petitioner's assignor and

in fact the customers started to do business with the respondents rather than the petitioner's assignor; that the machines were not in good working order as represented by the respondents, but worthless and absolutely useless because the respondents had taken the shuttles off the machines and carried them away with them, and at that time June, 1946, such shuttles were unobtainable from any place to replace those taken away by the respondents; that the respondents immediately after the sale to the petitioner's assignor engaged in the embroidery business in the immediate neighborhood of the business sold by them to the petitioner's assignor and renewed business relations with the same customers which were part of the good will and included in the sale of the business by the respondents to the petitioner's assignor. Petitioner's assignor also charges that the respondents transferred the telephone number for their own use in their own business; that the quality of the yarn sold to the petitioner's assignor was inferior quality.

The respondents after receiving Fifty-six Thousand ($56,000.00) Dollars, foreclosed on their mortgage and bought everything in themselves for the sum of Ten Thousand ($10,000) Dollars. In other words the petitioner's assignor got absolutely nothing for the Fifty-six Thousand Dollars now in the respondents' possession. This fact should be kept in mind because in all the cases wherein the Court upheld the doctrine of Election of Remedies or Res judicata, the plaintiff has kept and retained what went into his possession and in those cases where he did not so retain it were deposits of money involving only a few hundred dollars.

The petitioner's assignor former suit was for rescission and return of his Fifty-six Thousand ($56,000) Dollars. The present suit for damages is much broader in scope and asks for more money and many causes of action all different than that of rescission, the decision of which

was upheld by the Appellate Division 29 N. J. Superior 497, stated that the petitioner's assignor had made an Election and that Election was that he had ratified the contract and therefore could not come to Court of Equity for rescission. In accordance with the decision of the Equity Court upheld by the Appellate Division that the petitioner's assignor before going to equity had made his election in the law side of his causes of action for fraud, he is now through his assignee, suing for damages in accordance with said decision.

The respondents made a motion for summary judgment which the Superior Court denied. The Appellate Division upheld this Court, but the Supreme Court, reversed the decision of the other two Courts, and rendered a decree in favor of the respondents upon the sole ground of the new rules of the Judicial Article of the Constitution of New Jersey that went into effect after the petitioner's assignor had commenced his action for rescission. Although the new rules were in effect at the time the rescission action came to trial, no one knew about them, not even the respondents' attorney, as he did not mention it or bring it up in his brief in the Appellate Division or the Superior Court below.

Because of the foregoing the Constitutional question did not come up and was not anticipated until the Supreme Court by a surprise decision reversed the other two Courts, not upon cases heretofore decided by the highest Court of New Jersey, but upon the rules adopted after the petitioner's assignor had commenced his rescission action, and which rules were a novelty in the State of New Jersey Courts.

The petitioner immediately and within the ten days (provided for in the decision of the New Jersey Supreme Court below) made an application for a re-hearing. Such a petition for a rehearing was based solely upon the Constitutional grounds, exactly the same as herein, which was denied on March 8, 1954 by the Supreme Court of the State of New Jersey.

A case similar, if not on all four, with the petitioner's case at bar, is *Brinkerhoff-Farris Co.* v. *Hill,* 281 U. S. 673, where the Missouri Court held at pages 675-676:

> "that, because plaintiff had adequate legal remedy, it was not entitled to equitable relief, and because plaintiff had not complained to the Tax Commission, 'it was clearly guilty of laches in not doing so'. On these grounds the Missouri Supreme Court affirmed the judgment of the trial Court".

Prior to this the Missouri Court (in the petitioner's case at bar, the New Jersey's highest Court) had passed upon other cases of like nature favorable to the petitioner and now reverses itself by saying, if the statute in that case of Missouri (in the petitioner's case of New Jersey) if otherwise construed would violate their respective Constitutions.

This U. S. Supreme Court *Brinkhoff-Farris* v. *Hill, supra,* at page 677 says:

> "No one doubted the authority of the Lachlede case until it was expressly overruled."

In the petitioner's case at bar, no one doubted the New Jersey cases until they were expressly overruled by the New Jersey Supreme Court, for which the Writ of Certiorari is sought herein.

At page 677, the plaintiff seasonably filed a petition for a rehearing to the effect that the Missouri Court (as the petitioner did in the New Jersey Supreme Court) to the effect "the court transgressed the due process clause of the Fourteenth Amendment."

At page 678:

> "The additional federal claim thus made was timely, since it was raised at the first opportunity

Missouri ex rel. Missouri Ins. Co. v. Gefner, ante, p. 313. The petition was denied without opinion. This court granted certiorari 280 U. S. 550. We are of the opinion that the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

This petitioner's first opportunity to raise the federal question, by a petition for rehearing, the only way it could have been done, was also denied without opinion.

The federal guarantee of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government p. 670 *supra.*

A federal claim first raised by petition for rehearing in a state court is in time for purpose of review if the occasion for it arose unexpectedly from the grounds of the State Court's decision, *Great Northern Ry.* v. *Sunburst Oil Co.,* 287 U. S. 358, 366. This was also the fact in this petitioner's case at bar.

Herndon v. *Georgia,* 295 U. S. 441, 444:

"Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U. S. 317, 320; Ohio v. Akron Park District 281 U. S. 74, 79; Missouri v. Gebner, 281 U. S. 313, 320; Brink-

hoff-Farris Co. v. Hill, 281 U. S. 673, 677-678; American Surety Co. v. Baldwin, 287 U. S. 156, 164; Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358, 367."

The ruling of the New Jersey Supreme Court could not have been anticipated, as to construing the statute so as to deprive this petitioner of his right under the federal Constitution.

Sanders v. *Shaw,* 244 U. S. 317, 320:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

Missouri Ins. Co. v. *Gebner,* 281 U. S. 313, at page 316:

> "The statute means what the highest court of the State has construed it to mean, or in contemplation of law it does not exist."

There was thus, no way of knowing that there was a Federal Constitutional question until the New Jersey Supreme Court unexpectedly rendered the decision construing the newly enacted Statute. At the first opportunity, petitioner invoked the protection of the Federal Constitution by a petition for rehearing.

At page 320: "It could not earlier have assailed the section as violative of the Constitution" nor could this petitioner.

Petitioner's assignor cause of action in equity was dismissed because he had no such remedy of rescission, having by his own testimony and only on the testimony of petitioner's assignor—the respondent's not putting in their case—stated that he had made payments and conducted the embroidery business, and brought new parts of the embroidery machines after the discovery of the fraud. Thus, as a matter of law, he had ratified the contract, and did not have the remedy of rescission, at the time of commencement of his action of rescission which he mistakenly thought he had. He did not have two remedies to choose from, but only one, his present action at law. Nor was the judgment of dismissal on the merits. But in the *U. S.* v. *Oregon Lumber Co.* case, *supra,* the petitioner had the right to rescind and the choice of two inconsistent remedies, which this petitioner at bar did not have, together with the fact that justice required the enforcement of election of remedies in that case because of long lapse of time—18 years—that created an election of remedies with an estoppel, as appears at bottom of page 206:

> "The justice of enforcing the doctrine of election of remedies in this case is emphasized by a consideration of facts: The lands in question were conveyed by the United States in the year 1900. It was not until 1912 that the first suit was brought. The judgment, dismissing the bill in that suit, was rendered in 1916, and the present action was brought two years later. Thus a period of eighteen years had elapsed since the transfer of the lands before the present action was begun, during more than two-thirds of which time the United States had knowledge of all the facts upon which the plea of the statute of limitations was founded and sustained",

and at bottom of page 301:

> "and that it is now estopped from maintaining the present inconsistent action."

Furthermore the judgment of the *U. S.* v. *Oregon Lumber Co.* case was on the merits and the case was decided and determined on the merits, after evidence was put in by both sides pro and con, and this is true regardless of the fact that the case went against the plaintiffs on the findings that they knew of allegations before the six year special statute of limitations.

The plaintiff, the U. S. Government, produced evidence that they discovered their allegation within six years of the commencement of the action. The defendant introduced evidence that the government knew about it long before that. The Court found for the defendant. Therefore, the judgment was on the merits, as there was a trial pro and con of the whole case, including that of the statute of limitations. A statute of limitation is part and parcel of the entire case and is tried with the entire case. The Court finding for the defendant on the statute of limitation, there was no necessity to go further in its findings as that ends the case and properly so on the merits. At middle of page 297 appears:

> "The case went to trial and the court held the suit barred because the United States had notice of the fraud more than six years before suit was filed."

It therefore dismissed the bill on that ground. At bottom of page 293 and top of page 294 appears:

> "after trial upon the merits, the District Court dismissed the equity suit for the reason that the United States had had full knowledge of the matters complained of in its complaint for more than six years before the equity suit was instituted, and that no appeal was ever taken from the decree dismissing the complaint of the United States."

At page 299:

"The defense of the statute of limitations is not a technical defense but substantial and meritorious. The great weight of modern authority is to this effect. *Lilly-Brackett Co.* v. *Sonnemann,* 157 Cal. 192; *Wheeler* v. *Castor,* 11 N. Dak. 347, 353, *et seq.,* where the authorities are reviewed. Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary. *Bell* v. *Morrison,* 1 Pet. 251, 360; *Hangar* v. *Abbott,* 6 Wall. 532, 538; *Wood* v. *Carpenter,* 101 U. S. 135, 139; *Riddlesbarger* v. *Hartford Insurance Co.,* 7 Wall. 386, 390. And see *United States* v. *Chandler-Dunbar Water Power Co.,* 209 U. S. 447, 450. In *Wood* v. *Carpenter,* this Court said: 'Statutes of Limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.' In *Riddlesbarger* v. *Hartford Insurance Co.:* 'They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when,

by loss of evidence from death, of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.' "

The majority opinion in the *U. S.* v. *Oregon Lumber Co.* case quotes another U. S. Supreme Court case practically the same as this petitioner's case at bar which shows that this *Oregon Lumber Co.* case supports this petitioner and not the respondents. This appears at middle of page 295:

"*Friederichsen* v. *Renard,* 247 U. S. 207. That case, however, lends no support to the suggestion. The petitioner, Friederichsen, brought suit to cancel a contract for the exchange of lands, on the ground of fraud practiced upon him. Upon the coming in of the master it appeared that petitioner, pending suit, had cut a considerable amount of timber growing upon the lands which he had taken in exchange. Thereupon the court found he was not entitled to equitable relief because, by cutting the timber, he had ratified the contract and had rendered it impossible to put the defendant in *status quo,* but his remedy was at law for damages."

Holding further that under the circumstances the doctrine of election of remedies did not apply. But this *U. S.* v. *Oregon Lumber Co.* case is not the same as the petitioner's case at bar. Nevertheless, a careful reading and analysis also shows that the majority opinion of the law in this case supports this petitioner. Justice Brandeis in a strong dissent, concurred by the Chief Justice and Mr. Justice Holmes at page 309 states that the Courts of the States are in opposition to this rule of the majority as stated in this case. Justice Brandeis states in regard to the majority opinion. "A rule inconsistent with the principles heretofore established and opposed to a long line of well-considered decisions in State Courts. To do this seems to me regrettable."

Reasons for Granting the Writ

I

There are special and important reasons why this Court should exercise its sound judicial discretion.

The New Jersey Supreme Court's decision in this case is in conflict with not only all other decisions of the highest court of the State of New Jersey, but also with the decisions of the highest court of all the other States. It is also in conflict with all the decisions of the United States Supreme Court, except perhaps with one *U. S.* v. *Oregon Lumber Co.*, 260 U. S. 290 decided in 1922, which the New Jersey Supreme Court below cites.

The United States Supreme Court has not had occasion squarely to decide whether the case of *U. S.* v. *Oregon Lumber Co.*, decided 5 to 4 is the law. *U. S.* v. *Oregon Lumber Co.* is an old case decided in 1922 which, even if it were correctly cited (which is not the fact) and applied to the petitioner's case at bar, has been overruled or modified by other United States Supreme Court cases.

The fact that the New Jersey Supreme Court wrongly applies this *U. S.* v. *Oregon Lumber Co.*, case to the petitioner's case at bar, shows that the *Oregon* case is not understood by the Courts.

There is not a single federal or State Court decision cited in the Shepard's Citation appearing under this *U. S.* v. *Oregon Lumber Co.* case that approves or adopts that decision, and some, as the New Jersey Supreme Court, do not understand its meaning.

A recent United States Supreme Court case decided in 1949—*Brooks* v. *United States*, 337 U. S. 49—stated that this court will not pronounce a doctrine of election of remedies when Congress has not done so as stated at

page 53: "Nor pronounce a doctrine of election of remedies when Congress has not done so."

The *Oregon* case was based upon the Statute of Limitation, which is a statute of repose, having already run against the United States, but this was not the fact in petitioner's case at bar.

Bierce v. *Hutchins,* 205 U. S. 340, on p. 347, the court states:

> "The fact that a party through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has."

This case was cited. *Nat. Bondholders Corp.* v. *Seaboard Citizen Nat. Bank,* 110 F. 2d 138, 145 (1940), and other Federal and State Courts.

II

The Constitutional grounds was raised in the Petition for Re-hearing and it was the only time it could possibly have been raised, as heretofore stated. The Constitutional questions were no way anticipated until the rendering of the decision by the New Jersey Supreme Court. The decision itself brought forth the Constitutional questions.

The judgment of the New Jersey Supreme Court violated the federal Constitution. The act complained of was the act of the State Supreme Court.

The petition for rehearing which was denied without opinion is as follows, as presented to the New Jersey Supreme Court; with cases cited and quotations therefrom:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

The plaintiff-respondent presents this petition for a rehearing of the above case and, in support thereof, respectfully shows:

1. The appeal in this cause was argued before this Court on January 4 and January 11, 1954.

2. On February 15, 1954 this Court rendered its decision in favor of the defendants-appellants and against the plaintiff-respondent, reversing the judgment of the Appellate Division of the Superior Court.

3. The plaintiff-respondent seeks a rehearing upon the following grounds:

(a) The opinion of the Court by Honorable Justice Brennan in part states:

> "The Rules of Court also became effective on September 15, 1948 and the plaintiff does not suggest that the purchaser, at least by the time he moved the case, had any excuse on the ground of novelty of the practice or otherwise which relieved him of the necessity of prosecuting the action according to the Rules."

But this was an error for at the bottom of page 24 and top of page 25 of the plaintiff-respondent's brief appears:

> "The following appears in the foreword of the tentative draft of the revision of the rules. The numerous amendments which have made the lawyer's task of working with the rules more difficult. Even the plaintiff's attorney did not know of the Rule 3.8.5 (b) now Rule 4.8.5 (b). Nowhere in his brief in the Court below were they mentioned."

The plaintiff, thus, did state that not only his assignor was ignorant of the rules because of the novelty thereof, but even the defendants were ignorant thereof, as the defendants never mentioned anything about these rules in their brief in the motion for summary judgment nor in their brief in the Appellate Division, but mentioned it for the first time in their brief in the Supreme Court.

Therefore the new rules should not be applied to this case at bar.

The new rules should not be applied for the additional reason as stated at the top of page 48 of plaintiff-respondent's brief which reads in effect:

> "The case of State v. Jones, 4 N. J. 374, cited by the defendants was to the effect that, the constitutional question not previously raised would not be considered."

This being so, the defendants not having raised the question about the new rules introduced by the Judicial Articles of the 1947 Constitution, either in their motion for summary judgment or in the Appellate Division, should not have been considered by the Supreme Court (*State v. Jones*, 4 N. J. 374, *supra*).

(c) The decision of this Court shows that without the application of the new rules the judgment of the Appellate Division would not have been reversed, and the well established decisions of the Court of Error and Appeals of this State in regard to Election of Remedies and *Res Judicata* which were in conformity with that of all the other states nullified and reversed and the rule of *Stare Decisis* be modified, if not destroyed, making the present law of New Jersey in regard to Election of Remedies and *Res Adjudicata* different than all the other States and at one stroke cutting off the principles heretofore established by a long line of well considered decisions.

During the long passing of years the harsh rule of Election of Remedies had been practically abolished in this modern age and time, but is again put in full force and effect.

(d) No one knew the effect the Judicial Articles of the 1947 Constitution would have upon the law of Election of Remedies until the rendering of the present decision by this Court. Therefore the plaintiff-respondent should not be penalized. If it were applied to this plaintiff-respondent it would in effect be a retrospective act (decision), as to the plaintiff who relied upon a long line of well established decisions of the highest court of this State and will now, contrary to those decisions, be deprived of his day in Court as to the issue of fraud which was never passed upon by any Court.

(e) The plaintiff's assignor cause of action arose on the 14th day of June, 1946 or March 3rd, 1947 when he filed his Bill in the Chancery Court of New Jersey, mistakenly asking for rescission instead of going to the Law Court and asking for damages as he should have done. At these times, or at least on the latter date, the plaintiff's assignor had the right to have the issue of fraud passed upon by the Court or Jury.

The Judicial Article of the Constitution of New Jersey did not go into effect until September 15, 1948, at which time the plaintiff's assignor's right to have the issue of fraud passed upon by the Court or Jury were already in existence and the action pending in Court to deprive the plaintiff's already existing right by the Judicial Article of the New Constitution going into effect after the existence of such right to have the issue of fraud passed upon by the Court or Jury and such action already pending in Court would in effect be depriving the plaintiff (who stands in the shoes of his assignor) of

(1) due process of law contradictory to the constitution of the United States as guaranteed in the Fifth and Fourteenth Amendments to the Federal Constitution.

(2) be in effect a Retrospective and Retroactive Ex-Post Facto law as to the plaintiff's assignor and violates the due process provision of the Federal Constitution.

(f) The general rule of construction is that the law in force at the time and place of the making of the contracts enter into and become integral parts thereof as much as if they had been expressly incorporated therein, is applied in construing a contract to determine whether it has been impaired. Accordingly this plaintiff's assignor had six years time within which to sue and have his only available remedy (of the action for damages of the fraud) which he did, two days before June 14, 1952 when the six years would expire. But this Court's decision cut this vested right of the plaintiff's six year statute of limitation to the date of the trial of the action; namely, May 2, 1951, depriving the plaintiff of the Federal guaranty of due process by the Fourteenth Amendment of the Constitution of the United States, which extends to State action through judicial as well as through the legislative, executive or administrative branch of government, because the plaintiff was barred from having his cause of action for damages on the issue of fraud heard by any Court, by this shorter period than six years. The decision of the Court reads in part:

> "The opinion of the court was delivered by Brennan, J. Notable among the reforms introduced by the Judicial Article of the 1947 Constitution and the implementing Rules of Court is the fusion of the powers of Law and Chancery in one Superior Court functioning within a simple and flexible procedural framework designed and purposed for the just and expeditious determination in a single action of the ultimate merits of an entire controversy between litigants. It is a

fundamental objective of this procedural reform to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy. *Massari* v. *Einsiedler*, 6 N. J. 303 (1951); *In re McFeely*, 8 N. J. 9 (1951); *Tumarkin* v. *Friedman*, 17 N. J. Super 20 (App. Div. 1951), certif. den. 9 N. J. 287 (1952).

The policy of the new practice contemplates that the Superior Court litigant not only should initially plead any legal and equitable claims or defenses, whether or not consistent, supporting his position in the controversy and seek all legal or equitable remedies which he may desire, but also, with the aid of the broad discovery and pretrial procedures by which he may obtain all the facts material to the positions of both sides, that he should avail himself of the liberality allowed to form and reform his pleadings and the pretrial order accordingly, the opportunities for such amendment being restricted, in any substantial degree, only by Revised Rules 4:29-1 (15) and 4:15-2 applicable to amendments offered after the entry of the pretrial order, or during trial."

The foregoing Rules, upon which the judgment of the Appellate Division in favor of the plaintiff was reversed by this Court, went into effect September 15, 1948. But the plaintiff's assignor had commenced his action before these rules went into effect as shown by this Court's decision which follows that above quoted:

"The instant appeal involved a question concerning the alternative and inconsistent rights and remedies available to an allegedly defrauded purchaser of a business to disaffirm and rescind the transaction or to affirm and recover damages for the deceit. *Williston, Contracts*, vol. 5, sec. 1528; Rest., Contracts, Sec. 381, com (d); 18 *Am. Jur., Election of Remedies*, sec. 18, p. 141.

The purchaser, Harry M. Ajamian, bought an embroidery business from the defendants in June 1946. Within a month after taking possession he became aware of the allegedly fraudulent nature of representations allegedly made by the defendants to induce him to make the purchase. Nevertheless, he continued until March 1947 to deal with the property and to make instalment payments of the purchase price. On March 3, 1947, he filed a bill of complaint for rescission in the former Court of Chancery. The case was not moved, however, for almost three years, and on February 17, 1950, when it came on for pretrial conference, had been pending in the Superior Court for seventeen months after its automatic transfer to that court on September 15, 1948 pursuant to Article XI, sec. 4, para. 8(e) of the Schedule to the 1947 Constitution. The Rules of Court also became effective on September 15, 1948."

Therefore, the decision of this Court based upon the foregoing rule as to this plaintiff violates the impairment clause of Federal Constitution for the enforcement of the existing contract. The Federal Constitution prohibits any State from passing any law impairing the obligation of a contract.

When action is commenced in State Courts, right of action becomes properly within such state, and is subject to constitutional protection against deprivation by any State law. *Shosberg* v. *New York Life Ins. Co.*, 216 N. Y. S. 215, 217 AD 67, affirmed 155 N. E. 749, 244 N. Y. 482 and 155 N. E. 913, 244 N. Y. 599. Corpus Juris Secondum Ser. 611, P. 1222 N 59.

This plaintiff's assignor had a vested interest of six years within which to sue on his cause of action for damages on account of the fraud, which issue had never been passed upon by any court, before the enactment of the

present rules. A vested cause of action is property right and the due process clause must be preserved by some effective procedure. *Gibbes* v. *Zemmerman*, 290 U. S. 326.

Rights which have accrued to one under existing rules of law and have become vested are within the protection of the due process clause and can not be taken away by a change in the rules or remedies. *Coombes* v. *Getz*, 285 U. S. 434, C. J. S. Sec. 614, p. 1234.

The power of the legislature, this includes the Courts, to regulate remedies is subject to the constitution's provision of the law impairing the obligation of a contract. *Wilson* v. *Herben*, 47 N. J. L. 454, 32 Am. R. 243, which prohibition implies to laws impairing the means of enforcement; *McNeil* v. *Wall*, 13 F. Supp. 326, affirmed and 4 F. 2768, 4 F. Supp. 496; *In re Marx*, 5 F. Supp. 954 C. J. S., Sec. 381, p. 825.

Any subsequent law of the State, which so affects the remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution of the United States and therefore void. *Edward* v. *Klaizy*, 96 U. S. 595 and materially impairs *Lapp* v. *Belvedere*, 116 N. J. C. 563.

The decision of the Supreme Court by entirely taking away the plaintiff's right has violated the due process clause of the Fourteenth Amendment, C. J. S., Sec. 615 N. 37.

(g) The following is based upon the case of *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673 (United States Supreme Court, June 2, 1930). The facts and issue of this case are similar wherein the Missouri Supreme Court was reversed by the United States Supreme Court. The decision of this Court discriminates the plaintiff in violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

If the new rules gave the Chancery Court power to pass upon the issue of fraud, it should have done so. If, because

of the novelty of the new practice as stated by this Court, the Chancery Court did not know of its power, in accordance with the new rules, and dismissed the bill because of lack of jurisdiction as that Court believed and left the plaintiff's assignor to his only available remedy it ever had, that is for damages at law, instead of rescission of the contract as he mistakenly believed he had, and so finally determined by the Appellate Division. But before the determination of the Appellate Division this plaintiff commenced the action in the law Court, so as not to be outlawed by the six years of Statute of Limitations, as it certainly would have been had this plaintiff waited until the rendering of the decision by the Appellate Division. This plaintiff is now being criticized by this Supreme Court for taking an appeal to the Appellate Division from the ruling of the Chancery Court, by saying this plaintiff was "holding in reserve his one available remedy for the purpose of attack in another suit." If it is true as all the Courts including this Supreme Court states that this plaintiff's assignor had only one available remedy, how, in what manner if any, could this plaintiff's assignor have any reason for gain or otherwise, to "holding in reserve his one available remedy," except the fact he was mistaken in his remedy. This plaintiff had a legal right to have the higher Court determine what his remedy was, as long as the trial Court refused to pass upon the issue of fraud and to be penalized by this Supreme Court therefore is in itself discrimination in violation of the equal protection clause of the Fourteenth Amendment. *To be penalized for taking an appeal is to deny the plaintiff any relief, for the right to relief to the Courts includes the right to appeal where due process has not already been accorded in the tribunal of the first instance.* The Chancery Court dismissed the complaint of plaintiff's assignor for rescission because of laches and payments being made on the contract, without passing on the issue of fraud and in effect stated that the plaintiff's assignor's remedy was at law for damages, where the longer statute of limitation

was in effect; namely, six years. This in effect was upheld by the Appellate Division.

This plaintiff commenced his action at law for damages within the six years. The defendants' motion for summary judgment, on account of election of remedies and Res adjudicata was denied and the denial upheld by the Appellate Division. On appeal this Supreme Court holds that the plaintiff's assignor should have waived his right to appeal for the purpose of having a determination as to what his remedy was, and because he sought such determination from the Appellate Division, denies this plaintiff any relief whatsoever; namely: his present action in the law Court for damages, the only remedy that was ever available to him as determined by the Appellate Division, because of which appeal this plaintiff is penalized by this Supreme Court, even though this Supreme Court also determines that this was "his one available remedy." The Supreme Court states:

> "Even after the trial judge's oral decision from the bench had made his plight clear the purchaser offered no amendment although an opportunity to amend at that stage might readily have been allowed subject to the limitation of former Rule 3:15-2, and now N. R. 4:15-2. Instead he appealed to the Appellate Division from the judgment. Oral argument on the appeal was heard May 2, 1953."

This Supreme Court's decision says that the appeal by this plaintiff's assignor to the Appellate Division is a waiver of the plaintiff's right to sue in the law court:

> "effectuation of the policy requires that the purchaser's conduct be viewed in its only proper light as a deliberate and conscious waiver of his legal remedy."

This Supreme Court holds that because of the new rules (which went into effect after the plaintiff's assignor had

commenced his action for the equitable relief of rescission) the plaintiff's assignor should have amended his complaint to include the legal relief, and not have taken an appeal to the Appellate Division for the purpose of determining whether or not the trial Court was right in that the plaintiff did not have any equitable remedy of rescission, and that for taking the appeal this Supreme Court denies this plaintiff his only available remedy of an action for damages in the law Court or in any Court. This discrimination is in violation of the equal protection clause of the Fourteenth Amendment and the due process of law contradictory to the Fifth Amendment and the Fourteenth Amendment, and impairment clause for the enforcement of existing contract, of the Federal Constitution.

No one doubted the authority of the cases heretofore decided by the highest Court of New Jersey as stated in this Supreme Court's decision:

> "but, as here, upon finding of the unavailability of the rescission remedy by reason of the complainant's ratification of the contract before bringing suit, would probably not have barred the subsequent action at law for damages for the deceit. Stambovsky v. Chen, 124 N. J. 290 (E&A 1938). But this was because the former Court of Chancery had no jurisdiction to entertain a claim for the purely legal remedy and it was rightly considered to be inordinately harsh and unjust to conclude a complainant, denied the opportunity in the Chancery action, from seeking the only remedy for fraud in fact available to him. See *Adam* v. *Camden Safe Deposit & Trust Company*, 1212 N. J. Law 389 (Sup. Ct., 1938, Levy v. Massachusetts Accident Co., 127 N. J. 49 (E&A 1940)."

In refusing relief as to this plaintiff because of the new rules, which went into effect after the plaintiff's assignor had commenced his action under the old practice, this Su-

preme Court transgressed the due process clause of the Fourteenth Amendment of the Federal Constitution "using that term in the primary sense an opportunity to be heard and to defend a substantial right." *Brinkerhoff Farris Savings Co.* v. *Hill*, 281 U. S. 673 (1930).

The practical effect of the judgment of this New Jersey Supreme Court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense as to the issue of fraud. There is an invasion of the plaintiff's substantial right under the Federal Constitution to equality of treatment. *Green* v. *Louisville & Interurban R.R. Co.*, 244 U. S. 441; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 44.

Under the settled law of the State, the present remedy was the only one available. The plaintiff did not omit to comply with any existing condition precedent, in taking an appeal to have the Appellate Division decide whether the Court below was correct in its decision. *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499, 505.

If the decision of the Supreme Court is permitted to stand, deprivation of the plaintiff's property is accomplished without ever having had an opportunity to be heard on the issue of fraud. This refusal and denial of relief was not because of demerit in the complaint, but because the plaintiff did not amend his complaint in regards to the new rules that came in existence after the plaintiff's assignor commended his action, and by such amendment deprived himself of the right to go to the Appellate Division for the purpose of having the higher Court pass upon the determination of the trial Court's decision that this plaintiff's assignor did not at the time of his action for rescission possess such remedy.

Thus, by denying to the plaintiff the only remedy ever available for the enforcement of his right, the decision deprives the plaintiff of his property.

Brinkerhoff Farris T. & So. Co. v. *Hill*, 281 U. S. 673 (1930), The United States Supreme Court, upon which decision the foregoing is based, states, beginning at the bottom of page 679:

> "*Second.* If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. *Ettor* v. *Tacoma*, 228 U. S. 148. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley* v. *Weld County*, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the *Laclede* case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies

for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 475-6.

"*Third.* The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the State Tax Commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allegations of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the equal protection clause. The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion. Reversed."

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari should be granted.

Respectfully submitted,

AARON AJAMIAN,
Attorney *Pro se.*

APPENDIX

Opinion.

SUPREME COURT OF NEW JERSEY
A 72, September Term, 1953.

AARON AJAMIAN,
Plaintiff-Respondent,

vs.

ISIDORE SCHLANGER, HENRY SCHLANGER and SIDNEY SCHLANGER, trading as I. SCHLANGER & Co.,
Defendants-Appellants,

HARRY M. AJAMIAN,
Additional defendant on counterclaim of Isidore Schlanger, Henry Schlanger and Sidney Schlanger, trading as I. Schlanger & Co.

Argued January 4, 1954: decided.

On appeal from Superior Court, Appellate Division.

Mr. Isadore Glauberman argued the cause for appellants.

Mr. Aaron Ajamian, respondent, argued the cause *pro se.*

The opinion of the Court was delivered by BRENNAN, J.

Notable among the reforms introduced by the Judicial Article of the 1947 Constitution and the implementing Rules of Court is the fusion of the powers of Law and Chancery in one Superior Court functioning within a simple and flexible procedural framework designed and purposed for the just and expeditious determination in a single action of the ultimate merits of an entire con-

troversy between litigants. It is a fundamental objective of this procedural reform to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy. Massari v. Einsiedler, 6 N. J. 303 (1951); In re McFeely, 8 N. J. 9 (1951); Tumarkin v. Friedman, 17 N. J. Super. 20 (App. Div., 1951), certif. den. 9 N. J. 287 (1952).

The policy of the new practice contemplates that the Superior Court litigant not only should initially plead any legal and equitable claims or defenses, whether or not consistent, supporting his position in the controversy and seek all legal or equitable remedies which he may desire, but also, with the aid of the broad discovery and pretrial procedures by which he may obtain all the facts material to the positions of both sides, that he should avail himself of the liberality allowed to form and reform his pleadings and the pretrial order accordingly, the opportunities for such amendment being restricted, in any substantial degree, only by Revised Rules 4:29-I(15) and 4:15-2 applicable to amendments offered after the entry of the pretrial order, or during trial.

The instant appeal involves a question concerning the alternative and inconsistent rights and remedies available to an allegedly defrauded purchaser of a business to disaffirm and rescind the transaction or to affirm and recover damages for the deceit. Williston, Contracts, vol. 5, sec. 1928; Rest., Contracts, sec. 381, com. (d); 18 Am. Jur., Election of Remedies, sec. 18, p. 141.

The purchaser, Harry M. Ajamian, bought an embroidery business from the defendants in June 1946. Within a month after taking possession he became aware of the allegedly fraudulent nature of representations allegedly made by the defendants to induce him to make

the purchase. Nevertheless, he continued until March 1947 to deal with the property and to make instalment payments of the purchase price. On March 3, 1947, he filed a bill of complaint for rescission in the former Court of Chancery. The case was not moved, however, for almost three years, and on February 17, 1950, when it came on for pretrial conference, had been pending in the Superior Court for seventeen months after its automatic transfer to that Court on September 15, 1948 pursuant to Article XI, sec. 4, para. 8(e) of the Schedule to the 1947 Constitution. The Rules of Court also became effective on September 15, 1948. Plaintiff does not suggest that the purchase, at least by the time he moved the case, had any excuse on the ground of novelty of the practice or otherwise which relieved him of the necessity of prosecuting the action according to the Rules.

At the pretrial conference the defendants requested and were granted leave to amend their answer affirmatively to plead the defense of laches and estoppel "by reason of his, the purchaser's, conduct in the premises" and those issues were included among the ones listed in the pretrial order for disposition at the trial. However valid the purchaser's reasons for not earlier offering an amendment to ask legal damages for deceit, at least alternatively with the remedy of rescission, certainly it was highly imprudent not to offer such an amendment after this forewarning of the defendants' position, particularly as to the purchaser among all parties concerned was best informed as to his acts of conduct upon which the defenses were based. But he made no attempt to amend, then or during the three months which elapsed before trial, and went to trial pursuing the remedy of rescission only. His proofs were heard, and, as he might well have anticipated, his own testimony supplied the facts which substantiated the de-

fense that he had ratified the contract before bringing suit and was thus not entitled to rescind. Defendants' counsel accordingly moved for judgment at the close of his proofs and the trial judge, without determining the merits of the fraud charge (defendants' witnesses were present in Court, but the disposition made rendered their testimony unnecessary), granted the motion. Even after the trial judge's oral decision from the bench had made his plight clear and the purchaser offered no amendment although an opportunity to amend at that stage might readily have been allowed subject to the limitations of former Rule 3:15-2 now R. R. 4:15-2. Instead he appealed to the Appellate Division from the judgment. Oral argument on the appeal was heard on May 26, 1952.

Before the decision of the Appellate Division, which affirmed the judgment, was filed on July 1, 1952, Ajamian v. Schlanger, 20 N. J. Super. 246 (1952), the purchaser assigned his claim to plaintiff here, his brother, Aaron Ajamian, a member of the New York bar, who on June 12, 1952 commenced a new action in the Law Division of the Superior Court by filing a complaint making allegations virtually identical with the allegations in the bill of complaint for rescission, but asking damages for the alleged deceit. Defendants moved for summary judgment on the basis of the prior determination in the rescission suit, but the motion was denied. On appeal, the Appellate Division affirmed, one judge dissenting. N. J. Super. (1953). This appeal is therefore hereunder former Rule 1:2-1(b) now R. R. 1:2-1(b).

Upon the former practice, a Chancery judgment adverse to the complainant, resting not upon an adverse determination of the fraud charges making applicable the principles of res adjudicata, of Simon & Diamond Coal & Lumber Co. v. Belz, 107 N. J. Law 193 (E. & A., 1930) or upon other

matter raising an estoppel, but, as here, upon a finding of the unavailability of the rescission remedy by reason of the complainant's ratification of the contract before bringing suit, would probably not have barred the subsequent action by law for damages for the deceit. Stambovsky v. Cohen, 124 N. J. Eq. 290 (E. & A., 1938). But this was because the former Court of Chancery had no jurisdiction to entertain a claim for the purely legal remedy and it was rightly considered to be inordinately harsh and unjust to conclude a complainant, denied the opportunity in the Chancery action, from seeking the only remedy for the fraud in fact available to him. See Adams v. Camden Safe Deposit & Trust Company, 121 N. J. Law 389 (Sup. Ct., 1938), Levy v. Massachusetts Accident Co., 127 N. J. Eq. 49 (E. & A., 1940). The former Court of Chancery recognized, however, that in jurisdictions where legal and equitable powers were merged in the same Court, the law action is ordinarily barred when the plaintiff fails to take advantage of his opportunity to seek the legal relief in his original action. See Knight v. Electric Household Utilities Corp., 133 N. J. Eq. 87, 92 (Ch., 1943). With the merger of equitable and legal powers in the Superior Court as of September 15, 1948, there appearing to be no equities in defendants' favor to bar him, this purchaser was at liberty after that date to amend his rescission complaint to ask the legal relief alternatively, Rule 3:8-5, now R. R. 4:8-5, or to abandon the rescission claim and pursue the legal remedy, up to the time of or at the pretrial conference and, within limitations, even after the entry of the pretrial order, or at the trial. Therefore, when at the pretrial conference the infirmity of his case pointing to the futility of his quest for rescission was made apparent to him while there still remained ample opportunity for amendment and he offered none, preclusion of the new and independent action for damages by

his assignee must follow if the policy to void undue litigation is not to be emptied of substance. Effectuation of the policy requires that the purchaser's conduct be viewed in its only proper light as a deliberate and conscious waiver of his legal remedy. United States v. Oregon Lumber Co., 260 U. S. 290, 67 L. ed. 261 (1922). To tolerate his pressing of the pursuit for rescission, even though futile from the outset, to the limits to which it was carried here after the clear warning of its infirmities when the opportunity to shift his ground was still open to him, and to sanction his holding in reserve his one available remedy for the purpose of attack in another suit, would be utterly destructive of the policy to avoid multiplicity of litigation. "To hold otherwise would be to revive one of the worst defects of the old order and to do violence to both the letter and the spirit of the new Constitution". State v. Jones, 4 N. J. 374, 383 (1950).

Comment upon another change, this concerning a related aspect of the former practice, is appropriate. A subsequent law action for damages was barred under that practice if the victim of the fraud actually had both legal and equitable remedies available to him and, knowing the facts chose to seek rescission in Chancery. In such case the institution of the rescission suit was "usually regarded as a decisive act * * * a conclusive waiver of inconsistent, contradictory, and inimical modes of redress, even though the election has not been acted upon by another to his detriment". Lizak v. Rottenbucher, 140 N. J. Eq. 76, 81 (Ch., 1947); and see Micheloni v. Troy Hills, Inc., 121 N. J. Eq. 117 (E. & A., 1936), Claron v. Thommessen, 96 N. J. Eq. 650 (E. & A., 1924); cf., Titus v. Phillips, 18 N. J. Eq. 541 (E. & A., 1867). It is plain that that rule cannot and does not obtain under the new practice. Now that the victim may have recourse to the Superior Court

empowered to grant him the remedy he prefers under a practice allowing him, barring special equities favoring his adversary, freedom to shift his ground to seek the legal remedy alternatively or in substitution for rescission, he cannot be deemed conclusively to have waived the legal remedy without far more evidence than the mere filing of the complaint. It must appear, as it does in the instant case, that the victim, although knowing or being made aware of the risk, lets pass the opportunities afforded by the new practice for a shift of ground and remains steadfast in his pursuit of the equitable remedy. Young v. George C. Fuller Contracting Co. Inc., 12 N. J. Super. 554 (Law Div., 1951); and see Friederichsen v. Renard, 247 U. S. 207, 62 L. ed. 1075 (1917). Indeed, unless equities in favor of other parties intervene, his final choice of remedy under appropriate pleadings and pretrial order may await the close of the proofs at the trial. See Schrage v. Leibstein, 16 N. J. Super. 384 (App. Div., 1951), certif. den. 8 N. J. 431 (1952).

The judgment of the Appellate Division is reversed and the cause is remanded to the Law Division with direction to enter summary judgment in favor of the defendants.

Mandate on Reversal.

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET No. 1365

CIVIL ACTION ON APPEAL

AARON AJAMIAN,

Plaintiff-Respondent,

against

ISIDORE SCHLANGER, HENRY SCHLANGER and SIDNEY SCHLANGER, trading as I. SCHLANGER & Co.,

Defendants-Appellants,

HARRY M. AJAMIAN,

Additional defendant on counterclaim of Isidore Schlanger, Henry Schlanger and Sidney Schlanger, trading as L. Schlanger & Co.

This cause having been duly argued before this Court by Mr. Isadore Glauberman, counsel for the appellants and Mr. Aaron Ajamian, respondent, *pro se,* and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Appellate Division to be there proceeded with in accordance with the

rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton the 15th day of February, 1954.

JOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy

JOHN H. GILDEA,
Clerk.

Filed Feb. 15, 1954.
JOHN H. GILDEA,
Clerk.

Decree.

IN THE

SUPREME COURT OF NEW JERSEY

Docket No. 1365.

On Petition for rehearing.

AARON AJAMIAN,

Plaintiff-Respondent,

vs.

ISIDORE SCHLANGER, *et als.*,

Defendants-Appellants.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved for a reconsideration, it is Ordered that the petition for rehearing be denied.

WITNESS, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this eighth day of March, 1954.

JOHN H. GILDEA,
Clerk.

Filed:

March 8, 1954,
JOHN H. GILDEA,
Clerk.

A true copy,

JOHN H. GILDEA,
Clerk.

Office - Supreme Court, U.
FILED
SEP 22 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 256

AARON AJAMIAN,

Petitioner,

vs.

ISIDORE SCHLANGER, HARRY SCHLANGER and SIDNEY SCHLANGER, trading as I. SCHLANGER and COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION FOR THE RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

AARON AJAMIAN,

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ISIDORE SCHLANGER, HARRY SCHLANGER and SIDNEY SCHLANGER, trading as I. SCHLANGER and COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION FOR THE RESPONDENTS

Opinions Below

The letter-memorandum opinion of the Superior Court, Law Division, is unreported. The opinion of the Superior Court, Appellate Division, is reported in 29 N. J. Super. 497. The opinion of the Supreme Court of New Jersey is reported in 14 N. J. 483.

Jurisdiction

The judgment and mandate of the Supreme Court of New Jersey were filed February 15, 1954, the mandate to issue ten days thereafter unless an application for rehear-

ing should be made. An application for rehearing was denied on March 8, 1954. Petitioner's time for filing petition for writ of certiorari was extended to and including August 5, 1954, by order of Associate Justice Harold H. Burton, entered June 7, 1954. Jurisdiction of this Court is invoked by petitioner under Section 1257 (3) of Title 28, U. S. C. A.

Questions Presented

1. Whether it appears on the record before this Court that a federal question constituting an appropriate ground for review by this Court was presented in and expressly or necessarily decided by the Supreme Court of New Jersey.

2. Whether the State Court judgment barring on the ground of waiver petitioner's action at law for deceit presents a federal question of substance, where, under the circumstances of the case, petitioner's assignor had had ample opportunity in prior litigation for rescission of contract to press any claim for deceit by virtue of the New Jersey Rules of Court permitting the joinder of legal and equitable causes of action.

Court Rule Involved

The case involves Revised Rule 4:8-5, formerly Rule 3:8-5, of the Rules Governing the Courts of the State of New Jersey, which provides as follows:

> 4:8-5. Pleading to be Concise and Direct; Consistency
>
> (a) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(b) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 4:11.

Statement

(Petitioner has not served the respondents with any notification pursuant to Rule 21, paragraph 2, of the Rules of this Court, as to the contents of the record filed under the said Rule. The respondents will refer in this statement to the petitioner's printed appendix and to the printed appendix in the Supreme Court of New Jersey. Page references to the latter appendix are preceded by "D".)

On Octobr 2, 1946, Harry Ajamian, the present petitioner's assignor, instituted a suit in the former New Jersey Court of Chancery against the present respondents for rescission, on the ground of fraud, of a contract made on June 14, 1946, for the purchase by him, from the present respondents, of an embroidery business (D53a-16). On October 14, 1946, the said suit was dismissed without prejudice. Following the dismissal, Harry Ajamian paid the present respondents several installments on the purchase price under the contract. *Ajamian* v. *Schlanger,* 20

N. J. Super. 246, 248 (App. Div. 1952). As noted in the opinion below (petitioner's appendix, 31-32), petitioner's assignor became aware, within a month after taking possession, of the allegedly fraudulent nature of representations allegedly made by the present respondents to induce him to purchase, and nevertheless, he continued until March 1947 to deal with the property and to make installment payments of the purchase price.

On March 3, 1947, petitioner's assignor filed another suit for rescission in the then Court of Chancery against the same respondents based on the identical allegations. *Ajamian* v. *Schlanger,* 20 N. J. Super. 246, 247-248 (App. Div. 1952). The latter action lay dormant for almost three years, until February 17, 1950, when it came on for pretrial conference. By that time the case had been pending in the newly established Superior Court of New Jersey for seventeen months, after its automatic transfer to that Court on September 15, 1948, pursuant to the Schedule to the new 1947 Constitution of New Jersey (petitioner's appendix, 32).

The subsequent developments in the case are summarized in the following excerpt from the decision below (petitioner's appendix, 32-33; *Ajamian* v. *Schlanger,* 14 N. J. 483, 486-487 (1954)):

> "• • • The rules of court also became effective on September 15, 1948, and the plaintiff [the present petitioner] does not suggest that the purchaser, at least by the time he moved the case, had any excuse on the ground of novelty of the practice or otherwise which relieved him of the necessity of prosecuting the action according to the rules.

At the pretrial conference the defendants [the present respondents] requested and were granted leave to amend their answer affirmatively to plead the defense of laches and estoppel 'by reason of his [the purchaser's] conduct in the premises' and those issues were included among the ones listed in the pretrial order for disposition at the trial. However valid the purchaser's reasons for not earlier offering an amendment to ask legal damages for deceit, at least alternatively with the remedy of rescission, certainly it was highly imprudent not to offer such an amendment after this forewarning of the defendant's position, particularly as the purchaser among all parties concerned was best informed as to his acts of conduct upon which the defenses were based. But he made no attempt to amend, then or during the three months which elapsed before trial, and went to trial pursuing the remedy of rescission only. His proofs were heard, and, as he might well have anticipated, his own testimony supplied the facts which substantiated the defense that he had ratified the contract before bringing suit and was thus not entitled to rescind. Defendants' counsel accordingly moved for judgment at the close of his proofs and the trial judge, without determining the merits of the fraud charge (defendants' witnesses were present in court, but the disposition made rendered their testimony unnecessary), granted the motion. Even after the trial judge's oral decision from the bench had made his plight clear the purchaser offered no amendment although an opportunity to amend at that stage might readily have been allowed subject to the limitation of former *Rule* 3:15-2, now R.R. 4:15-2. Instead he appealed to the Appellate Division from the judgment. Oral argument on the appeal was heard on May 26, 1952.

> Before the decision of the Appellate Division, which affirmed the judgment, was filed on July 1, 1952, *Ajamian* v. *Schlanger*, 20 N. J. Super. 246 (1952), the purchaser assigned his claim to plaintiff here, his brother, Aaron Ajamian, a member of the New York bar, who on June 12, 1952 commenced a new action in the Law Division of the Superior Court by filing a complaint making allegations virtually identical with the allegations in the bill of complaint for rescission, but asking damages for the alleged deceit. Defendants moved for summary judgment on the basis of the prior determination in the rescisison suit, but the motion was denied. On appeal, the Appellate Division affirmed, one judge dissenting, 29 N. J. Super. 497 (1953) * * *."

The Supreme Court of New Jersey reversed the last-mentioned judgment of the Appellate Division which had affirmed the denial of the motion to dismiss by the present respondents. *Ajamian* v. *Schlanger*, 14 N. J. 483 (1954).

The State Supreme Court said (14 N. J. at 487-489):

> "Under the former practice, a Chancery judgment adverse to the complainant, resting not upon an adverse determination of the fraud charge making applicable the principles of res adjudicata, cf. *Simon & Diamond Coal & Lumber Co.* v. *Belz*, 107 N. J. Law 193 (E. & A. 1930), or upon other matter raising an estoppel, but, as here, upon a finding of the unavailability of the rescission remedy by reason of the complainant's ratification of the contract before bringing suit, would probably not have barred the subsequent action at law for damages for the deceit. *Stambovsky* v. *Cohen*, 124 N. J. Eq. 290 (E. & A. 1938). But this was because the former Court of Chancery had no jurisdiction to entertain a claim

for the purely legal remedy and it was rightly considered to be inordinately harsh and unjust to conclude a complainant, denied the opportunity in the Chancery action, from seeking the only remedy for the fraud in fact available to him. See *Adams* v. *Camden Safe Deposit & Trust Company*, 121 N. J. L. 389 (Sup. Ct. 1938); *Levy* v. *Massachusetts Accident Co.*, 127 N. J. Eq. 49 (E. & A. 1940). The former Court of Chancery recognized, however, that in jurisdictions where legal and equitable powers were merged in the same court, the law action is ordinarily barred when the plaintiff fails to take advantage of his opportunity to seek the legal relief in his original action. See *Knight* v. *Electric Household Utilities Corp.*, 133 N. J. Eq. 87, 92 (Ch. 1943). With the merger of equitable and legal powers in the Superior Court as of September 15, 1948, there appearing to be no equities in defendants' favor to bar him, this purchaser was at liberty after that date to amend his rescission complaint to ask the legal relief alternatively, *Rule 3:8-5, now R.R. 4:8-5*, or to abandon the rescission claim and pursue the legal remedy, up to the time of or at the pretrial conference, and, within limitations, even after the entry of the pretrial order, or at the trial. Therefore, when at the pretrial conference the infirmity of his case pointing to the futility of his quest for rescission was made apparent to him while there still remained ample opportunity for amendment and he offered none, preclusion of the new and independent action for damages by his assignee must follow if the policy to avoid undue litigation is not to be emptied of substance. Effectuation of the policy requires that the purchaser's conduct be viewed in its only proper light as a deliberate and conscious waiver of his legal remedy. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100, 67 L. Ed.

261 (1922). To tolerate his pressing of the pursuit for rescission, even though futile from the outset, to the limits to which it was carried here after the clear warning of its infirmities when the opportunity to shift his ground was still open to him, and to sanction his holding in reserve his one available remedy for the purpose of attack in another suit, would be utterly destructive of the policy to avoid multiplicity of litigation. 'To hold otherwise would be to revive one of the worst defects of the old order and to do violence to both the letter and the spirit of the new Constitution.' *State ex rel. Wm. Eckelmann, Inc.*, v. *Jones*, 4 N. J. 374, 383 (1950)."

Neither the petitioner nor petitioner's assignor at any time in the proceedings below, prior to the application for rehearing before the Supreme Court of New Jersey, gave the slightest indication either in pleading, in argument, or otherwise, of any intention or desire to invoke the protection of the Federal Constitution in any manner. None of the opinions below disclose on their face or implicitly any indication that the respective courts deemed themselves to be considering or deciding a federal constitutional question.

Argument

The petition seeking review by this Court is frivolous.

The belated assertion for the first time of a federal constitutional right in the application for rehearing before the State Supreme Court does not satisfy the requirements as to the timely presentation of an appropriate federal question; nor, so far as respondents (being unnotified of the contents of the record filed by petitioner) are in a position to determine, does the record before this Court

afford even a possibility of determining whether those requirements are met. Petitioner's printed appendix before this Court contains only the opinion of the Supreme Court of New Jersey, the mandate of that court on reversal and the order denying a rehearing. Respondents, as just stated, not having been notified by petitioner as to the contents of the record filed pursuant to Rule 21, paragraph 2, and petitioner's printed appendix not containing the petition for rehearing, the pleadings, or the evidence below, respondents are entitled to suggest that the case comes within the principle of *McGarrity* v. *Delaware River Bridge Commission,* 292 U. S. 19, and that the petition should be denied for want of a properly presented substantial federal question. The utter obscurity, at best, of the record as regards any affirmative appearance thereon that decision of a federal question was necessary to determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it, would seem to compel the denial of the petition. E.g., *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52.

In any event, even endowing with optimum formulation petitioner's belated and obscure assertion that his federal Constitutional rights have been infringed by the application to his case of the New Jersey Court Rules which afford the usual "Code State" opportunities for joinder of legal and equitable causes of action, no federal question of any substance is presented. The impingement of the State Court Rules on petitioner in this case does not even arise in the form of an interference with any remedy pertaining to contractual rights, inasmuch as petitioner's action for damages for deceit, which was barred below, sounds in tort rather than contract. Even if there were

said to be presented here a question of impairment of the obligation of a contract, or of due process, the case is merely one of modification of the remedy of enforcement, and the modification of remedy in this situation is a permissible one. Cf. *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124; *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 439; *Wilson* v. *Standefer*, 184 U. S. 415; *Campbell* v. *Iron-Silver Min. Co.*, 83 Fed. 643 (C. C. A. 8, 1897). Indeed, there seems to be no doubt that the net effect of the New Jersey practice changes of 1948 was to create for litigants like the present petitioner and his assignor a more beneficial remedy than existed theretofore. Cf. *Williamsport etc. Turnpike* v. *Startzman*, 86 Md. 363, 38 Atl. 777 (1897); *Berkovitz* v. *Arbib*, 230 N. Y. 261, 130 N. E. 288 (1921).

Conclusion

For want of a properly presented substantial federal question, and because the case in no aspect presents any question meriting review by this Court, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

ISADORE GLAUBERMAN,
Attorney for Respondents.